

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agree the record should also reflect the inclusion of three separate stipulations filed with the Court. These include records from the following medical providers: Dr. Philip Mills' records dated May 8, 2002 and July 16, 2002, a Work Therapy Discharge Summary from Via Christi Back to Action dated June 14, 2002, records from Via

Christi Regional Medical Center dated July 16, 2001 and August 14, 2001, and the records of Dr. William Waswick and Dr. Robert Bingaman.¹

ISSUES

The ALJ found claimant was permanently and totally disabled under K.S.A. 44-510c(a)(2) based upon the uncontradicted testimony of two psychiatrists, both of whom diagnosed claimant with post-traumatic stress syndrome along with depression and anxiety.

The respondent requests review of this conclusion. Respondent concedes claimant sustained an orthopaedic injury to his shoulder and knee as well as chemical burns to a significant portion of his body while working for respondent. Respondent likewise does not seriously contest the ALJ's conclusion that claimant is permanently and totally disabled. However, respondent maintains claimant's present problems, both psychiatric and orthopaedic, are exaggerated and/or are unrelated to his industrial injury. Specifically, respondent points to claimant's recent aortic aneurism as the source of his inability to work. Respondent maintains that although claimant has orthopaedic injuries to his shoulder and knee, there is "no evidence that either of these conditions provides significant restrictions or limitations which prevent him from working."² Woven throughout its brief is respondent's contention that claimant is uncooperative in his care and continually dishonest to his caregivers about his past drug seeking behavior. Respondent argues that claimant has been released from treatment for his orthopaedic and burn injuries and is capable of working although admittedly, claimant has failed to make any effort to obtain employment.

For these reasons, respondent asks the Board to modify the ALJ's Award to reflect a functional impairment for the burns and orthopaedic impairments, excluding any award for claimant's psychiatric problems.

Claimant contends that the findings of the ALJ should be affirmed in all respects.

The sole issue to be decided in this appeal is the nature and extent of claimant's impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ See Stipulations filed Aug. 26, 2004, Sept. 1, 2004, and Sept. 21, 2004.

² Respondent's Brief at 2 (filed Dec. 10, 2004).

The ALJ's Award sets forth the pertinent facts and circumstances surrounding claimant's accidental injury and those are adopted as if more fully stated herein. It is undisputed that claimant suffered extensive burns to a significant portion of his body on July 16, 2001, when he was showered with sulfuric acid while working for respondent. In the months following his accident, he underwent a series of debridements, skin grafts and even now, years later, still suffers from open wounds.

In addition to the burns, claimant suffered a torn rotator cuff to his left shoulder, during the accident which was surgically repaired in September 2001. Thereafter, he suffered a fall while convalescing at home and injured his knee. The knee was examined and in April 2004, and surgery was performed to relieve claimant's ongoing complaints of pain.

In addition to the treatment referenced above, claimant has been hospitalized several times with pneumonia and lung infections. In 2004, he suffered an aortic aneurism.³ At the time of the regular hearing, claimant still had open wounds on several areas of his body. He maintains he cannot work as he is unable to lift or bend over. And he must take narcotics to stem the pain caused by his burns.

In June of 2002, claimant apparently completed a course of work therapy. While this program was intended to be done up to 7-8 hours per day, claimant was only able to perform 1-4 hours per day, 3 times per week due to his ongoing medical problems. The discharge summary indicates claimant had "marginal" lifting and position task body mechanics.⁴ He also had poor balance apparently due to "numbness" along the right side of his body, where the largest portion of his burn occurred. Overall, the discharge summary reflects that even after 40 visits, claimant was only "partially" able to meet any of the 5 goals identified by the therapist. Nonetheless, the therapist concluded claimant was able to safely function within the light-medium physical demand level. He was discharged as of June 14, 2002. This evaluation, however, did not take into consideration the psychiatric component of his condition, nor any of his subsequent physical problems.

Not surprisingly, claimant has experienced some significant emotional problems following his accident. Two psychiatrists who examined claimant, diagnosed him with post-traumatic stress disorder along with depression and anxiety. Likewise, these professionals attribute these diagnoses to the work-related accident, which is the subject of this claim.

Board certified psychiatrists, Dr. Acutha Reddy and Dr. Gerald W. Leisy, both agree claimant is totally disabled from substantial gainful employment. Dr. Leisy, who has

³ At oral argument, claimant's counsel made it clear that the aortic aneurism was unrelated to the claimant's compensable injury.

⁴ Stipulation (Sept. 1, 2004) at 5 (p. 3 of the discharge summary dated June 14, 2002).

continued to treat claimant diagnosed severe post-traumatic stress disorder, elements of severe anxiety, depression and brief psychotic episodes.⁵ According to Dr. Leisy, this condition significantly impedes claimant's ability to accomplish his activities of daily living, to adapt to situations, to concentrate or handle social situations. Dr. Leisy stated that claimant could possibly function for an hour or two, but that in no way would he be able to do more without impairment.⁶

He testified that claimant continues to require antidepressant medication as well as treatment for anxiety and psychosis coupled with out-patient psychotherapy. Dr. Leisy further testified that whether claimant might have, at some point in the past, suffered from drug or alcohol abuse would not alter his opinions. Put simply, he attributes claimant's ongoing psychiatric problems to his work-related accident.

Claimant was evaluated by Dr. Acutha Reddy, in October 2003. Dr. Reddy also diagnosed post traumatic stress disorder along with anxiety and major depressive disorders, and polysubstance dependence, presently in remission. Dr. Reddy saw claimant on 4 occasions and concluded claimant is permanently and totally disabled due to the post traumatic stress disorder. He quite forcefully testified that claimant's post-traumatic disorder was not present before his accident and is attributable to that event.

In addition to the psychiatrists, three orthopaedic physicians have offered impairment ratings. Dr. Robert Eyster testified that claimant bears a 6 percent permanent partial impairment to the left shoulder for the torn rotator cuff.⁷ Although he surgically treated claimant's left knee, he assigned no permanency for claimant's lower extremity.

Dr. Pedro Murati testified that claimant bears a 50 percent impairment to the body as a whole for the resulting skin disorder, 2 percent impairment to the body as a whole for the right shoulder, and 6 percent impairment to the body as a whole for the left shoulder. When combined, this yields a 54 percent permanent partial impairment to the whole body. Dr. Murati did not offer any impairment rating for the psychiatric condition.

Dr. Murati assigned claimant permanent restrictions based on an 8 hour day of no climbing ladders, no squatting, no crawling, no manual driving, no kneeling, no repetitive right foot controls, no heavy grasping, no work above shoulder work, no lifting or carrying, no pushing or pulling more than 20 pounds, no work more than 24 inches from the body,

⁵ Although respondent's counsel's brief suggests Dr. Leisy has terminated his treatment relationship with claimant, this fact is not contained within the record. It is merely a statement made in respondent's brief to the Board.

⁶ Leisy Depo. at 9.

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

no use of hooks or knives, no lifting below the belt buckle, no using vibratory tools, occasional standing and walking, rare stair climbing, frequent repetitive right hand controls, occasional right hand grabbing and grasping, use of wrist splints at home and work. No work is to be done at temperatures of less than 68 and no more than 70 degrees, and no working in dirty or dusty atmospheres.⁸ Based upon these restrictions, Dr. Murati concluded that claimant has an 100 percent task loss based upon the task loss analysis prepared by John Roselle.

Dr. Mills' records which were admitted into evidence by stipulation, reflect a permanent impairment assessment of 6 percent to claimant's right shoulder and 3 percent to the left shoulder. He also assigned a 10 percent impairment to the body as a whole for the burns to claimant's skin. When converted and combined, this yields a total of 15 percent impairment to the body as a whole. Dr. Mills apparently requested a functional capacity evaluation in June 2002. This document purports to suggest claimant is capable of functioning in the light-to-medium capacity.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁹

In *Wardlow*,¹⁰ the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his

⁸ Murati Depo., Ex. 2 at 5.

⁹ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹⁰ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case, the ALJ concluded claimant was permanently and totally disabled. He clearly based his finding solely upon the psychological component of claimant's claim, as he specifically referenced the two psychiatrists' opinions and the fact that they were uncontroverted. The ALJ made no finding with respect to claimant's permanent functional impairments for his burns, shoulder or knee problems. To do so would have been needless as the award for permanent total disability exceeds any award that might be given for the functional impairments.¹¹

The Board has considered the parties' arguments as well as the evidence contained within the record and finds the ALJ's Award should be affirmed. The respondent's argument that claimant's psychiatric complaints are unrelated to his underlying injury is unpersuasive given the medical testimony and the significant nature of his resulting injuries. This is true despite of respondent's argument that claimant's psychiatric problems pre-date his work related accident or stem from nonwork-related sources. Although respondent obviously does not accept it, Dr. Leisy quite clearly testified that claimant's alleged previous drug problems would not alter the opinion that claimant's present psychiatric diagnosis was caused by his accident. Dr. Reddy also testified that claimant's post-traumatic stress syndrome as well as his anxiety and depression are attributable to his accident. The fact that claimant had a drug problem before his injury does not, absent further evidence, invalidate his claim. While there were and continue to be emotional stressors in claimant's life that would psychiatrically impact him, it remains uncontroverted that the events of July 16, 2001, gave rise to claimant's present psychiatric condition. That accident and his resulting condition render him less able to handle the events that transpire in his life.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 27, 2004, is affirmed.

¹¹ K.S.A. 44-510f(a)(1).

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director